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May 27, 2011

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VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: *Indiana Southwestern Railway Co. – Abandonment Exemption – In Posey and Vanderburgh Counties, IN*, STB Docket No. AB-1065X

Dear Ms. Brown:

Attached hereto is the "Reply Of Indiana Southwestern Railway Co." to the Town of Poseyville's May 23, 2011 one-page letter filing. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosures

cc: J. Michael Carr
Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

STB Docket No. AB-1065X

**INDIANA SOUTHWESTERN RAILWAY CO.
– ABANDONMENT EXEMPTION –
IN POSEY AND VANDERBURGH COUNTIES, IN**

REPLY OF INDIANA SOUTHWESTERN RAILWAY CO.

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May 27, 2011

**Attorneys for Indiana Southwestern
Railway Company**

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC**

STB Docket No. AB-1065X

**INDIANA SOUTHWESTERN RAILWAY CO.
– ABANDONMENT EXEMPTION –
IN POSEY AND VANDERBURGH COUNTIES, IN**

REPLY OF INDIANA SOUTHWESTERN RAILWAY CO.

On May 23, 2011, the Town of Poseyville (the “Town” or “Poseyville”) filed a one-page letter (“Letter”) requesting that the Board’s April 8, 2011 decision (the “April 8 Decision”) in this proceeding “be overturned or held in abeyance” to allow Poseyville to revive its efforts to acquire certain rail lines through the Offer of Financial Assistance (“OFA”) process. Indiana Southwestern Railway Company (“ISW”) hereby replies in opposition to the Town’s Letter.

BACKGROUND AND SUMMARY OF ARGUMENT

The Board is well aware of the factual and procedural background of this proceeding, and ISW will not revisit it in detail here. For purposes of ISW’s reply, it is sufficient to focus on the particulars of the April 8 Decision, and Poseyville’s action (or inaction) thereafter. In short, the Town’s effort to have the April 8 Decision “overturned or held in abeyance” is untimely and procedurally deficient. Even if the Letter is accepted, the Board cannot grant the relief requested because the time to file an OFA has passed. Even if the Board were nevertheless to entertain Poseyville’s Letter, the Town has presented insufficient evidence of financial responsibility to warrant restarting the OFA process.

ARGUMENT

I. THE TOWN'S LETTER IS UNTIMELY AND PROCEDURALLY DEFICIENT, AND THE REQUESTED RELIEF IS THEREFORE UNWARRANTED

The April 8 Decision clearly states that the Town had two hurdles to overcome to permit the OFA process to resume. First, the Town had to make a “show[ing] on review” to reverse the Board’s prior finding that Poseyville was not financially responsible, and it had to make such showing before May 23.¹ Second, assuming the Town made a sufficient showing of financial responsibility, the Town needed to file a request to set terms and conditions on or before May 23. The Town has not overcome either hurdle, and its request to “overturn or hold in abeyance” the Board’s April 8 Decision should be denied.

A. The Letter Should Be Rejected As Untimely

In its April 8 Decision, the Board gave the Town sufficient time before the effective date of ISW’s abandonment authority to seek review of the Board’s decision. Poseyville was advised to seek review of the April 8 Decision *before* that decision’s May 23rd effective date, and was instructed, if it chose to seek review, to “present new evidence or changed circumstances regarding financial responsibility to support any appeal,” in accordance with 49 C.F.R. § 1152.25(e)(4). Rather than making its decision effective in 30 days as is customary, the Board made its April 8 Decision effective 45 days later to give the Town time to seek review of that decision *before* it became effective.

Poseyville has not filed a petition to reopen or to reconsider as it was advised to do. It has instead filed a one page Letter asserting without supporting documentation that it has secured a bank’s commitment to finance the purchase of the subject rail line, and requesting the Board to “overturn or hold in abeyance” its April 8 Decision. The Town made no effort to

¹ April 8 Decision at 7, Ordering Par. 1.

comply with the requirements of section 1152.25(e)(4), or the procedures governing petitions to reopen and reconsider administratively final decisions in abandonment proceedings. As such, the filing should be rejected as untimely, or it should simply be denied.

Even if the Letter were charitably to be treated as a petition to reopen, Poseyville is not entitled to relief because its “petition” was filed well after the applicable deadline.² To begin with, the Board’s April 8 Decision took effect 45 days after service “to give the Town sufficient time to seek review . . . should it desire to do so *before it becomes effective*.” April 8 Decision at 6 (emphasis added). Also, under 49 C.F.R. § 1152.25(e)(2)(i), a petition to reopen, which is the proper vehicle to seek review of an administratively final decision involving an abandonment proceeding, was due 15 days after the April 8 Decision (April 25). The Board’s rules also provide that a petition to reopen must be accompanied by a request for a stay pursuant to 49 C.F.R. § 1152.25(e)(7).³ But the Town ignored these regulatory requirements, just as it has ignored the evidentiary standard that the Board had so clearly indicated in its April 8 Decision would apply.

Even if Poseyville could be excused for its failure to discern the interrelationship between the evidentiary standard of section 1152.25(e)(4) and the petition for reopening deadline at section 1152.25(e)(2)(i), Poseyville cannot be excused for ignoring the Board’s explicit instruction that a petition for review be filed *before* May 23, 2011. Because the Town’s request for review is untimely and not in accordance with the Board’s directions, the Board is not

² The Town’s Letter is rife with procedural deficiencies and the like. Poseyville represents that it served ISW with a copy of its Letter “by overnight mail” – indicating that it accomplished service in the same manner that it filed its Letter with the Board. In fact, while the Board received the Letter by next-day delivery, the Town served ISW by two-day delivery, so that ISW did not receive its copy until May 24. In addition, Poseyville did not include with its Letter a filing fee appropriate for a petition to reopen or an appeal of a Board decision.

³ Under section 1152.25(e)(2)(i), ISW would have had 5 days to reply to the stay petition, and until May 3 to reply to the petition to reopen.

obligated to act on Poseyville's request, and it can and should simply reject the Letter.⁴

Furthermore, because the Letter does not comply with section 1152.25(e)(4), ISW need not reply. Nonetheless, ISW has replied quickly (under 49 C.F.R. § 1104.13, ISW has 20 days to reply to Poseyville's Letter) in an effort to reach an expeditious resolution of the Town's request, and to allow ISW greater certainty with respect to its short-term plans to dispose of the rail lines' assets.

B. There Is No Longer An OFA Process To Hold In Abeyance

Even if it could be argued that the Letter is sufficient to establish the Town's financial responsibility, such a finding would simply mean that the Town could then file an OFA, *if the time period for filing an OFA had not yet expired*. But the time to file an OFA has passed, and Poseyville's asserted financial responsibility is moot. The Board's April 8 Decision was quite clear. It gave the Town time to seek reopening, gave ISW a chance to reply to that request, and enabled the Board to rule on a reopening request by May 23.⁵ It instructed the Town to file its request to set terms and conditions by May 23, 2011, "should it successfully show on review that

⁴ See 49 C.F.R. §§ 1104.6 and 1104.10; Union Pacific Railroad Company – Abandonment Exemption – In Lassen County, CA, And Washoe County, NV, STB Docket No. AB-33 (Sub-No. 230X) (STB served Nov. 26, 2008)(filing rejected for failure to comply with the Board's rules); Keokuk Junction Railway Company d/b/a Peoria And Western Railway – Lease And Operation Exemption – BNSF Railway Company; Keokuk Junction Railway Company d/b/a Peoria & Western Railway – Lease And Operation Exemption – BNSF Railway Company Between Vermont And Farmington, IL, STB Finance Docket No. 34974, STB Finance Docket No. 34918 (STB served Dec. 6, 2007)(striking pleading as untimely); BNSF Railway Company – Abandonment Exemption – In Oklahoma County, OK; Stillwater Central Railroad, Inc. – Discontinuance Of Service Exemption – In Oklahoma County, OK, STB Docket No. AB-6 (Sub-No. 430X), STB Docket No. AB-1040X, (STB served Feb. 27, 2007)(request to late file an OFA denied); Wisconsin Central LTD. – Abandonment – In Ozaukee, Sheboygan And Manitowoc Counties, WI, STB Docket No. AB-303 (Sub-No. 27) (STB served Nov. 5, 2004)(OFA extension request denied as untimely).

⁵ In its April 8 Decision, the Board exercised its exemption authority under 49 U.S.C. § 10502 to hold the due date for a request to set terms and conditions in abeyance pending the effective date of the instant decision.

it is financially responsible.” Id. at Ordering Par. 1.⁶ Finally, it stated that “the OFA process in this proceeding is terminated on that date [May 23].” Id. at Ordering Par. 2. Regardless of the value of the Town’s late-filed “evidence” of financial responsibility, this OFA process ended on May 23, and there isn’t an OFA process to be “held in abeyance.” The abandonment authority is effective, and indeed, ISW has already begun the process of consummating abandonment, and it intends to continue that process.

II. THE TOWN IS NOT FINANCIALLY RESPONSIBLE

The Board would be abandoning its own rules and the dictates of its April 8 Decision if it were to accept the Letter and rule on its merits. And even if it were to do so, the Letter provides insufficient evidence to warrant reversal of the Board’s April 8 Decision finding the Town not to be financially responsible.

The Board employs a two-part OFA test: (1) the offeror must be financially responsible; and (2) the offer must be bona fide. To prove its financial responsibility, an offeror must show its ability to pay for and acquire the line.⁷ Here, the Town’s “evidence” consists exclusively of a statement by the Town’s counsel that his client has secured a \$1.5 million bank commitment. Such an unsupported, undocumented, and unverified statement has never before been sufficient to establish an offeror’s financial bona fides. The Board has rejected OFAs where – (1) the offeror has not provided verified assurances from the third party from which the offeror intended to secure the needed funds;⁸ (2) where no agreement with the purported source of funds has been

⁶ The Board obviously envisioned a successful Town appeal of the Board’s April 8 Decision as an essential prerequisite to a request to set terms and conditions on or before May 23.

⁷ Union Pacific Railroad Company – Abandonment – in New Madrid, Scott, and Stoddard Counties, MO, STB Docket No. AB-33 (Sub-No. 261), slip op. at 1 (STB served Jul. 30, 2009) (“Union Pacific – Missouri”).

⁸ See Union Pacific – Missouri at 2.

produced;⁹ and (3) the offeror has supplied only vague and unsubstantiated assertions of its ability to fund the purchase and acquisition.¹⁰ Under these precedents, the Town's half-hearted attempt to re-start the OFA process must be denied, particularly because the Town understood the importance of establishing its financial responsibility.

An offer must also be bona fide. Here, the Town continues to avoid the subject and has presented no evidence to meet this standard. In the case of an inactive rail line where there is no apparent demand for rail service, the Board requires offerors to submit evidence of a public need for continued rail service.¹¹ In this case, however, the Town has made no such showing.¹² As such, procedurally deficiencies aside, even when viewed on the merits, the Town has failed to show it is a bona fide offeror.

CONCLUSION

Congress intended the OFA process to strike a balance between legitimate efforts to preserve rail service, and the financial interests of rail carriers seeking on a timely basis to

⁹ See Arizona & California Railroad Company – Abandonment Exemption – In San Bernardino and Riverside Counties, STB Docket No. AB-1022 (Sub-No. 1X) (STB served Jul. 15, 2009).

¹⁰ Union Pacific Railroad Company – Abandonment Exemption – In Lassen County, CA, And Washoe County, NV, STB Docket No. AB-33 (Sub-No. 230X) (STB served Sept. 19, 2008) (“UP – Lassen County”).

¹¹ See The Land Conservancy Of Seattle and King County – Acquisition and Operation Exemption – The Burlington Northern and Santa Fe Railway Company, et al., STB Finance Docket No. 33389, et al., slip op. at 14 (“Land Conservancy of Seattle”) (STB served May 13, 1998); cf. CSX Transportation Inc. – Abandonment Exemption – In Glynn County, GA, STB Docket No. AB-55 (Sub-No. 697X), slip op. at 3 (STB served Jul. 9, 2009) (“offerors are reminded that the OFA process is designed for the purpose of providing continued rail service. The Board need not require the sale of a line under the OFA provisions if it determines that the offeror is not genuinely interested in providing rail service or that there is no likelihood of future traffic”); UP – Lassen County, slip op. at 2 (same).

¹² In Land Conservancy of Seattle, the Board very clearly admonished would-be offerors seeking to acquire long-inactive lines through the OFA process to submit evidence of the public need for continued rail service. Here, the Town has never shown that its OFA efforts are in the interest of meeting any current or future public need for rail service.

recoup the value of rail assets to be abandoned. The OFA statute and its legislative history clearly require proceedings to be conducted expeditiously, and they mandate that the process accommodate only legitimate efforts to preserve rail service.

Unfortunately, no such balance has been achieved here. The Town, planning once again to wait until the very last minute (actually, after the last minute) to ask for more time, reveals its intent to stall and obfuscate, and ISW, thanks to Poseyville's dilatory tactics, has suffered an unjustified five-month delay in its ability to salvage its lines. ISW has spent a lot of money in attorney's fees, NLV experts, and real estate experts – all “just in case” the Board just might find the Town's OFA to be legitimate and allow the OFA to proceed.¹³ The Board has been more than accommodating to Poseyville, having time and again given the Town the opportunity to make its case properly, but every time, the Town has ignored the Board's directives, filing last-minute, barely cognizable pleadings, which simply impose more delay and cost. It is time for the Board to stop this procedural charade.

The Town's Letter filing is untimely, fails to follow proper procedures, and therefore should be summarily rejected. Furthermore, the April 8 Decision is already effective, and so, even if the Town could have proven itself to be financially responsible, ISW's abandonment authority took effect earlier this week, the OFA process has terminated in accordance with the April 8 Decision, and there is no OFA process to hold in abeyance. Finally, even if the Board were once again to give the Town the benefit of the doubt and consider the Letter on its merits,

¹³ The Board's OFA process provides a railroad with only 5 days to respond to an OFA request to set terms and conditions, but it does not require an OFA proponent to file a terms and conditions request. Thus, once the Board finds a potential offeror to be financially responsible, the railroad must spend time and money on experts and attorneys in order to be able to respond to a potential terms and conditions request that the offeror *may or may not* file. This is not good public policy, because it allows an offeror to force more costs on a railroad already losing money by holding onto an unprofitable line, without subjecting the offeror to any of the costs the OFA imposes on the abandoning carrier. There are ways to balance the scales, and the Board should consider revising its procedures.

the Town has provided insufficient evidence to establish its financial responsibility or to show that its offer is bona fide.

Respectfully submitted,



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Attorneys for Indiana Southwestern
Railway Company

May 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Supplement to ISW's Appeal by mailing copies of the same to all parties via prepaid first class mail to all parties of record in these proceedings or by more expeditious means of delivery.

Dated at Washington, D.C. this 27th day of May, 2011.



William A. Mullins
Attorney for Indiana Southwestern
Railway Company